In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY MEMORANDUM FOR THE UNITED STATES

This memorandum is filed pursuant to permission granted by the Court at the oral argument. It will cover matters not considered in the Government's main brief and points raised during the argument.

1. *The construction of the indictment with respect to the allegations as to interstate commerce in other industries.* Appellees argue that the indictment, as construed by the court below alleged only restraints upon interstate commerce in fire insurance itself and not upon commerce in other industries, and that therefore the Government's case must fall if the fire insurance business is not in interstate commerce. We think that the case

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can stand entirely as it relates to restraints upon the interstate commerce of the fire-insurance companies, and the greater part of our main brief is devoted to that proposition. Indeed, Count 2 of the indictment charges only "a conspiracy to monopolize trade and commerce in fire insurance" (R. 13). Count 1, however, in paragraph 21, charges that appellees (R. 10–11)—

> * * * have engaged knowingly and continuously in a conspiracy to fix and maintain arbitrary and noncompetitive premium rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, which conspiracy has been in restraint of *the interstate trade and commerce described in this indictment*, in violation of section 1 of * * * the Sherman Act.

Paragraph 24, entitled "effect of the conspiracy," alleges that the action of the appellees has had the intended effect (R. 12)—

> * * * of unlawfully suppressing competition in the sale of fire insurance, of preventing the determination by free and competitive practices of premium rates on fire insurance sold by defendants, of arbitrarily controlling and fixing *noncompetitive premium rates on fire insurance*, in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, *and* have had the effect *thereby of restrain-*

ing the interstate trade and commerce described in this indictment, in violation of section 1 of the Sherman Act.

The differentiation between the allegations in Count 2, which deals only with "commerce in fire insurance," and those in Count 1, which deals with the "commerce described in the indictment," cannot be disregarded or treated as meaningless.

The final paragraph of Count 1 does, it is true, state that the conspiracy restrains and burdens "interstate trade and commerce in fire insurance" (R. 13). But this paragraph is only the customary formal conclusion to the count, and it cannot be said to negative the specific description of the conspiracy and its effects in paragraphs 21 and 26.

We then come to the question as to what constitutes the "interstate trade and commerce described in this indictment." Paragraphs 13–20 are entitled "Nature of Trade and Commerce Involved." In addition to the allegations relating to the insurance companies' own business, paragraph 14 alleges that the properties insured include "airplane hangars, auto garages, steamboats, tugs, and ferries * * * shipyards, warehouses and terminals, trucks and busses, railroad equipment and rolling stock, and goods, wares, and merchandise of all types carried in transit in interstate and foreign commerce by motor vehicles, railroads, airplanes, and other media of transportation."

Paragraph 15 states that fire insurance "is essential to and directly affects the flow of interstate commerce" and then avers that—

> Goods, wares, and merchandise of all kinds, to the value of millions of dollars, are constantly moving in the current of interstate commerce.

The commerce described in the quoted passages constitutes interstate trade or commerce "described in the indictment." A combination to fix the rates of fire insurance upon goods in commerce and instrumentalities of commerce increases the cost of and thereby restrains commerce in such goods or instrumentalities. Cf. *Local 167* v. *United States*, 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255. Appellees assert that the court below constructed the indictment as alleging only a restraint on trade and commerce in fire insurance, and that under the Criminal Appeals Act this Court is bound by the construction of the indictment adopted by the district court. The latter proposition is correct, and we do not deny that if the court below did interpret the indictment in the manner suggested, this Court would be bound by that construction. But we do not think that the court below purported to or did construe the indictment.

Appellees (Br. p. 4) refer only to three sentences as showing a construction of the indictment. The first sentence (R. 17) contains merely a very general summary of the indictment as

charging a conspiracy to fix noncompetitive rates "on fire insurance" in Count 1 and a conspiracy "to monopolize trade and commerce in fire insurance" in Count 2. This sentence cannot fairly be regarded as an interpretation of the indictment. Insofar as Count 1 is concerned, the summary does not indicate what commerce is being restrained.

The next sentence quoted by appellees (R. 17) declares that "the restraint and monopoly denounced must be that of interstate trade or commerce" or the indictment must fall. This is a mere statement of a correct conclusion of law, not a construction of the indictment.

This last passage cited by appellees is the sentence at the end of R. 17. The court there said:

> It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same (R. 18).

The language suggests that the court was thinking in the same terms as the legal discussion in *Hooper* v. *California*, 155 U. S. 648, 655, and *New York Life Insurance Co.* v. *Deer Lodge County*,

231 U. S. 495, 508–509, with respect to the non-essential nature of the use of the facilities of interstate commerce. The sentence seems to say only that the Court is of the view that the *question presented* is not whether the appellees participated incidentally in interstate commerce or used its facilities, but whether the insurance business itself constituted commerce. This statement of the issue does not seem to be a construction of the indictment. It is entirely consistent with the view that the Court thought the allegations as to other industries irrelevant to the legal question; if that were the meaning of the opinion, the issue of relevance would raise a question as to the construction of the statute, not one as to the interpretation of the indictment.

The opinion as a whole does not seem to be directed in any way at the construction of the indictment. The discussion relates entirely to the meaning of the statute, and the court's limitation of the issue to the business of the appellees seems to be predicated upon its notion that the allegations as to other industries were of no legal consequence. Inasmuch as the Sherman Act clearly applies to intrastate restraints upon the interstate conduct of others (*United States* v. *Patten*, 226 U. S. 293), such a position would seem to be a misconstruction of the statute rather than an interpretation of the indictment.

We do not think that the court below would have "construed" Count 1 of the indictment, in

disregard of its language, without at least indicating that it was dealing with a problem of construction. An intention to adopt such a construction cannot fairly be read into the opinion. Accordingly, we do not think that the opinion below attempts to construe the indictment at all, or that the indictment has any other meaning than that which its language suggests.

2. Appellees attempt to minimize the insurance on goods and things in commerce by asserting that only four percent of the premiums written in the six Southeastern states is "inland marine" insurance. All fire insurance on things in commerce is not inland marine—but even if it were, and if the percentage were as suggested, fire insurance would still, as alleged (R. 9), be essential to all goods moving in interstate commerce. A restraint which affects *all* interstate freight movements can hardly be regarded as insubstantial, even though it may also affect other matters to a greater degree.

3. In view of a question asked by the Chief Justice, we believe that we should state that it is our position that a combination of fire insurance companies to fix rates both restrains interstate commerce in the commodities or objects insured and the competition in interstate commerce of the insurance companies themselves. Insofar as the latter is concerned, the companies are unquestionably engaged in such commerce, and if they agreed not to compete and attempt to force others not to compete with them, the busi-

ness in which they are engaged is restrained within the meaning of the antitrust law.

The fire insurance contract is not to be regarded as merely the making of a local agreement, but as one to be performed by the payment of money by the insured to the company across state lines, and if there is a loss, by the payment from the company to the insured of money across state lines. The fact that payment is made through an agent does not make performance of a contract any the less interstate. Thus a restraint on competition in the sale of fire insurance is a restraint on freedom in making contracts to be performed in interstate commerce, and since the companies are in the business of performing and facilitating the performance of such contracts, a restraint affecting the contracts is a restraint on the entire business of the companies.

Furthermore, the indictment alleges that appellees conspired to exclude from the fire insurance business companies not members of the Association. If any part of the activities of such companies is interstate—whether the interstate transmission of funds or the interstate communications which are essential to the existence of the business—the exclusion of such companies from such interstate business is undoubtedly a restraint of interstate commerce. This aspect of the case does not depend at all upon whether the contract is interstate, but merely upon whether any portion

of an insurance company's activities are interstate.

4. Questions from the bench during the argument raised the problem as to the effect of a decision that the insurance business is in interstate commerce upon state laws which require insurance companies to obtain a license in order to do business within a state. It is true that a company doing an exclusive interstate commerce business may not be required to obtain permission to do business in a state. *E. g., Pacific Tel. & Tel. Co.* v. *Washington,* 297 U. S. 403; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218. This does not mean, however, that states may not use the device of licensing as a means of enforcing reasonable regulations under the police power even as to interstate commerce. Thus a state has the power to prevent property from coming across its borders in interstate commerce when necessary to protect the public health and welfare. *Mintz* v. *Baldwin,* 289 U. S. 346. Closely in point here are the Blue Sky Law cases. *Hall* v. *Geiger-Jones Company,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stockyards Co.,* 242 U. S. 559; *Merrick* v. *Halsey and Co.,* 242 U. S. 568. In those cases, companies selling securities from other states were required to obtain a state license, conditioned upon compliance with reasonable regulation adopted for the purpose of protecting the states' citizens against fraud. If a license

system is not used to exclude foreign corporations from a state but as a means of compelling compliance with regulations which could have been directly imposed without being an undue burden on interstate commerce, the use of a licensing device need not be fatal in itself.

We think that state insurance regulations fall in that category. As the insurance cases themselves demonstrate, the states do not seek actually to prohibit foreign insurance companies from entering the state, but require corporations wishing to do business within the state to comply with conditions which serve legitimate regulatory or taxing functions. To the extent that the conditions would be valid, we see no reason why state laws should be condemned because of the nature of the sanction employed.

The underlying test as to the validity of state legislation affecting interstate commerce is whether it imposes an undue burden (*California* v. *Thompson*, 313 U. S. 109, and cases cited), and that must be determined as a matter of substance in the particular case and not by the form in which the statute is drawn or by any other mechanical formula. Cf. *Parker* v. *Brown*, 317 U. S. 341, 362; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505.

5. The question was asked as to whether construction of the Sherman Act as reaching intra-

state transactions "affecting" interstate commerce would not indicate that the use of the word "affect" was superfluous in other commerce regulations. The Sherman Act, however, applies not to practices *in* interstate commerce—as did the provision of the Federal Trade Commission Act considered in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349—but to "restraints of" such commerce. Commerce may be restrained by intrastate transactions, as this Court has often held. See cases cited in the Government's main brief, pp. 66–67, 81–82. Thus to hold that the Sherman Act goes to the limits of the commerce power as to the type of restraint with which it deals indicates only that when a statute uses the word "restrain" as distinct from "in", it need not also say "affect".

6. The excerpts from the opinions of Judge Learned Hand in *Thames & Mersey Marine Insurance Co.* v. *United States*, 217 [redacted]. 683, 685, referred to in the oral argument, are as follows:

> In passing I may state that I cannot regard the cases relied upon by the United States and holding that the usual insurance business is intrastate as at all in point. None of those cases involved the insurance of goods in interstate commerce, and Congress may well have control over such contracts. The grant of power over interstate commerce is not to be confused with the clause here in question (p. 684).

I said in the other opinion that none of the insurance cases concerned only insurance on goods in transit. In this I was wrong. *Hooper* v. *California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, dealt with a tax upon the business of marine insurance in San Francisco. Some of the marine insurance written in that city is, I suppose, upon coastwise trade to Eureka on the north and Santa Cruz and San Diego on the south; but the immense mass of it must be either to foreign ports or to Oregon and Washington. In any event, no such distinction was taken; but the case went squarely upon the theory that taking insurance upon foreign or interstate trade was not itself foreign or interstate business.

The prohibition against taxing exports has been treated as analogous to the prohibition on the states against regulating interstate trade. It is not, perhaps, necessary to say whether the cases are precisely the same. It is enough that the reasoning in *Hooper* v. *California, supra*, presupposes, without expressly deciding, that it is the same, and that if the business was interstate the tax was void. Certainly at that time that was the accepted doctrine.

I need not consider whether there is today a zone in which the states may act till Congress intervene, and whether a state might not tax a business which Congress could regulate. *Hooper* v. *California, supra*, seems to me directly to support the defendant (p. 686).

7. The Act providing for the issuance of marine insurance policies by a Bureau of War Risk Insurance in the Treasury Department (c. 293, 38 Stat. 711, repealed 43 Stat. 629) begins as follows:

> Whereas the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war; and
>
> Whereas it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war: * * *

It should be observed that this Act was passed on September 2, 1914, before the United States entered the war, and on its face purported to be an exercise of the commerce and not the war powers.

8. In their brief (pp. 59–60) and argument, in order to prove the effectiveness of state regulation in preventing excessive insurance rates, appellees stated that the average fire insurance premium rate dropped from $1.15 per hundred dollars for the period 1900–1909 to $.61 in 1942, a reduction of nearly 50%. Appellees did not state that the very table they cite (The Weekly Underwriter, *Record of Fire Insurance by States for 1942* (1943), p. 124) shows that during the same period losses paid on the insurance written de-

creased from $.65 per hundred dollars to $.23, or 64.6% as compared to 47%. We think all this irrelevant, but believe that the entire picture and not merely part of it should be before the Court.

Respectfully submitted,

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